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No. 712

In the Supreme Court of the United States

JANUARY TERM, 1961

UTAH CITIZENS RATE ASSOCIATION and STRUCTURAL STEEL & FORGE CO.,

Appellants,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY,
SOUTHERN PACIFIC COMPANY,
THE WESTERN PACIFIC RAILROAD COMPANY,
UTAH RAILWAY COMPANY,
TOOELE VALLEY RAILWAY COMPANY,
SALT LAKE GARFIELD AND WESTERN RAILWAY COMPANY,
THE OGDEN UNION RAILWAY AND DEPOT COMPANY,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FROM THE DISTRICT OF UTAH

APPELLANTS' JURISDICTIONAL STATEMENT

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APPELLANTS' JURISDICTIONAL STATEMENT

COME NOW the appellants above named and in accordance with the provisions of Rule 13(2) of the Rules of the Supreme Court of the United States, submit the following jurisdictional statement in support of their appeal to this court:

A. The opinions issued in this matter by the Court below have not at this time been published in Federal Supplement. The Memorandum Decision and the Order on plaintiffs' Motion to Alter or Amend the Judgment are set forth in full in the appendix hereto.

B. The jurisdiction of this court is evoked upon the following grounds:

1. This was an action brought by the appellants for the purpose of annulling and setting aside an Order of the Interstate Commerce Commission under the provisions of Title 49, U.S.C. 19 (9) and Title 28, U.S.C. Sections 1366, 1398, 2284, 2321, 2322, 2323, 2324 and 2325 and pursuant to Title 5, U.S.C. Section 1009. The action thus commenced was required by the statutory provisions above quoted to be heard and determined by a District Court of three judges.

2. The matter was heard by a District Court of three judges on the 8th day of August, 1960. On the 23rd day of November, 1960 the court issued a Memorandum Decision denying the permanent injunction sought by the appellants and dismissing the action. Thereafter on the 2nd day of December, 1960 the appellants filed a Motion to Alter or Amend Judgment. The court's order on this motion was filed on January 9, 1961. The Memorandum Decision and the Order are set forth in the appendix hereto. As the appellants could not determine from the rules whether the pendency of the Motion to Alter or Amend Judgment stayed the running of the time for appeal, a Notice of Appeal to the Supreme Court of the United States was filed with the United States District Court for the District of Utah on the 16th day of December, 1960, within 30 days of the Memorandum Decision, but before the Order on the Motion to Alter or Amend Judgment. An

additional Notice of Appeal was filed with the United States District Court for the District of Utah on the 11th day of January, 1961.

3. Title 28, U.S.C. 1253 covers jurisdiction of this Court to entertain a direct appeal from such final decree as embodied in the Memorandum Decision.

4. The jurisdiction of this Court to consider such appeal was expressly upheld in the following cases: *United States v. Hancock Truck Lines, et al,* 324 U.S. 774; 89 L.ed 1357; *Interstate Commerce Commission v. Hoboken Manufacturers,* 320 U.S. 368; 88 L.ed 107. Although the question of jurisdiction was not expressly raised or passed upon, the Court in the following recent cases has taken jurisdiction of appeals from such orders: *Louisiana Public Service Commission v. United States,* 348 U.S. 889; 99 L.ed 696, rehearing denied 348 U.S. 921, 99 L.ed 723. *Mississippi Public Service Commission v. United States,* 349 U.S. 908, 99 L.ed 1244; *State of North Carolina et al v. United States et al,* 350 U.S. 805, 100 L.ed 46; *Public Service Commission of Utah et al v. United States of America et al,* 356 U.S. 421; 2 L.ed 2nd 886; rehearing denied 357 U.S. 933; 2 L.ed 2nd 1375.

C. The questions presented by this appeal here are as follows:

1. Were the report and findings of the Interstate Commerce Commission, challenged in the above entitled case, supported by substantial evidence?

2. Does the amendment to Section 13 of the Interstate Commerce Act by the Transportation Act of 1958 authorize the Interstate Commerce Commission to take jurisdiction of and raise Utah intrastate freight rates on the basis of a showing of an overall need for an increase in rates without a showing

evidence, consideration or findings as to whether or not the deficiency in revenue claimed by the carriers arises from the passenger deficit and without any consideration of whether or not freight rates should be required to subsidize the passenger deficit?

3. May the Interstate Commerce Commission and the Court find that conditions incident to transportation of freight in Utah are not more favorable than those incident to interstate transportation between Utah and adjoining states without any showing, evidence, or finding that terminal costs within the state of Utah are not more favorable to the railroads than their system wide terminal costs?

4. May the Interstate Commerce Commission and the Court find that conditions incident to intrastate transportation of freight in Utah are not more favorable than those incident to interstate transportation between Utah and the adjoining states without a showing, evidence, or finding that unit revenue derived from intrastate traffic within the state of Utah is not higher than that derived from interstate traffic of the intervening defendants?

5. Does the evidence introduced by the railroads in this case in regard to density of traffic cure the defects found by the Supreme Court of the United States to exist in the case of *Public Service Commission of Utah v. United States*, 356 U.S. 421?

6. Does the fact that interstate and intrastate freight shipments of the intervening railroads are handled by the same trains, by the same crews, by the same accounting department, and the same traffic department establish that all factors bearing on the reasonableness of intrastate rates are the same as those affecting interstate rates?

7. May it be assumed that interstate and intrastate rates were in proper relationship before the proposed increases?

8. May the Interstate Commerce Commission and the Court ignore the evidence of the protestants which detracts from the weight of the evidence of the railroads?

STATEMENT OF FACTS

In a proceeding entitled, "Increased Freight Rates 1951," which will hereinafter be referred to as Ex Parte 175, the Class 1 railroads of the United States made application to and were granted by the Interstate Commerce Commission authority to increase interstate freight rates and charges by a total of 15%, subject to certain exceptions and hold-downs.

In June of 1951 the Class 1 railways operating within the state of Utah made application to the Public Service Commission of Utah for an increase in intrastate freight rates in the same percentage sought from the Interstate Commerce Commission on interstate rates in Ex Parte 175. After hearing, the Public Service Commission ruled that the railroads had failed to present evidence from which the Commission could determine whether or not the intrastate freight rates of the applicant railroads produced sufficient revenue to provide a fair share of their overall revenue requirements. This order was made "without prejudice to the applicants to apply for further hearing for the presentation of further evidence." The railroads presented no further evidence before the Public Service Commission of Utah but made application to the Interstate Commerce Commisson under the provisions of 49 U.S..C 13(3)(4). Pursuant to this application the Interstate Commerce Commission entered into an investigation of Utah intrastate freight rates under I.C.C. Docket No. 31484. After

hearing on the matter, the Interstate Commerce Commission issued its order directing the railroads to increase their intrastate rates by 15%.

Thereupon the Public Service Commission of Utah and the Utah Citizens Rate Association brought an action in the United States District Court for the District of Utah to annul and set aside the Interstate Commerce Commission order. The district court dismissed the action. An appeal was thereupon taken to the Supreme Court of the United States. The Supreme Court ordered

> "the judgment of the district court is reversed and the cause is remanded to that court with instructions to set aside the order of the Commission and remand the cause to the Commission for further proceedings in conformity with this opinion."
>
> Public Service Commission of Utah v. United States, 356 U.S. 421, 2 L.ed 2d. 886.

While this litigation was pending in the courts, the Interstate Commerce Commission had granted additional freight rate increases interstate to the railroads in two proceedings designated Ex Parte 196 and Ex Parte 206, the Ex Parte 196 increase being 6% and the Ex Parte increase being 12%.

The railroads made application to the Intetstate Commerce Commission under 49 U.S.C. 13 to grant increases on Utah intrastate rates in the same percentages as had been granted on Ex Parte 196 and 206. This proceeding was assigned Docket No. 32253. After the decision of the Supreme Court in *Public Service Commission v. United States et al, supra*, Docket numbers 31484 and 32253 were consolidated and further hearings were had thereon. On December 7, 1959, the Interstate Commerce Commission issued the order which

is here under attack. This order increased the Utah intrastate freight rates and charges, with certain exceptions by 36.5%. The appellants then brought action in the United States District Court for the District of Utah for an injunction setting aside the Interstate Commerce Commission order. At the hearing before the United States District Court for the District of Utah the entire transcript of the proceedings in Docket numbers 31484 and 32253, including exhibits, was introduced in evidence and it was on the basis of this evidence that the parties sought relief. The evidence was substantially the same in nature with some additions as that considered by the Supreme Court and found insufficient in *Public Service Commission of Utah et al v. United States et al, supra.* The additional evidence will be commented on more fully hereinafter.

The evidence falls generally into four categories:

1. Operating statistics of the railroads.

2. Comparative interstate and intrastate rates.

3. Similarity of intrastate and interstate operating conditions.

4. General economic study of Utah.

1. *Operating statistics of the railroads.*

The railroads introduced evidence as to the systemwide operating figures of the roads in question. In the year 1957, the last year for which complete figures were available, Denver & Rio Grande Western Railroad Company showed a rate of return of 8.02%; Southern Pacific Company (which has only a minute amount of Utah intrastate traffic) 4.38%; Union Pacific Railroad Company 5.18%; Western Pacific Railroad Company 4.64%, based upon the Interstate Commerce Commission's elements of value rate bases and eliminating as a

railroad expense income taxes allocable to non-operating income.

Both the railroads and the protestants introduced breakdowns upon certain formulae designed to show a rate of return for Utah operations alone. In regard to these breakdowns, however, the Interstate Commerce Commission stated on page 18 of its order:

> "Since the figures which comprise the starting point for the intrastate and interstate separations are dependent upon train-mile apportionments, the evidence thus submitted by both the respondents and the protestants is unreliable for the purpose intended."

2. *Comparative interstate and intrastate rates.*

The protestants introduced rate studies which show that many intrastate rates without the increases are as high or higher than interstate rates including the increases. The railroads introduced no comparative rate studies based upon like units of traffic, a situation which caused Commissioner Freas in his dissenting opinion in the Interstate Commerce Commission order to state:

> "If it is conceded that intrastate costs here are at least as high as interstate costs for similar traffic units, it is not established that unit revenue derived from the intrastate traffic is not also higher than that derived from interstate traffic."

3. *Similarity of intrastate and interstate operating conditions.*

The railroads introduced several witnesses who testified generally that intrastate and interstate freight was handled on the same cars, over the same rails, by the same platform crews and was accounted for by the same accounting depart-

ment. The protestants introduced evidence which showed that the total density of traffic within the state of Utah was materially higher than the density of traffic systemwide on the railroads in question. The railroads introduced evidence to show that the total Utah traffic was made up of a greater percentage of interstate traffic than intrastate traffic.

The railroads introduced evidence to show that wages of train crews tended to be higher per train mile on intrastate traffic than on interstate traffic.

No evidence was introduced by the railroads as to the similarity of terminal costs as they affect interstate and intrastate traffic.

No evidence was introduced by the railroads regarding the extent to which the alleged deficiency in overall earnings resulted from the passenger deficit rather than from insufficient freight rates.

4. *Economic conditions in Utah.*

Studies introduced by the railroads showed that in recent years the economy of Utah has changed from a primarily agricultural and mining economy to an industrial economy.

ARGUMENT

The principal matters presented to this court by this appeal are:

> A. Does the record on further hearing before the Interstate Commerce Commission supply the deficiencies in evidence found by this court to exist in the railroads' proof in Public Service Commission of Utah v. United States, 356 U.S. 421, 2 L.ed 2d 886.

B. Do the amendments to Section 13 of the Interstate Commerce Act made by the Transportation Act of 1958 relieve the railroads of any of their obligations of proof as established by this court in Public Service Commission of Utah v. United States.

As a preface to discussion of the merits of the case, the Court below stated:

> "The law of the case was established by the decision of the Supreme Court in Public Service Commission of Utah v. United States, supra. This decision remains controlling unless the state of the evidence before the Commission is now significantly different or the application of the Supreme Court's decision has been changed by the 1958 amendments to Section 13(4) of the Interstate Commerce Act, introduced by the Transportation Act of 1958."

These matters have not been previously determined by this court and are important not only to a decision of the instant case, but as a guide to the Interstate Commerce Commission and the state regulatory commissions in the exercise of their respective functions in regard to the establishment of intrastate railroad rates.

THE PASSENGER DEFICIT

In the case of *King v. United States*, 344 U.S. 254, 97 L.ed 301, this court held that the Commission may give weight to deficits in intrastate passenger evenue when prescribing intrastate freight rates under Section 13 of the Interstate Commerce Act. This holding was to some extent modified by *Chicago M. St. P. & P. R. Co. v. Illinois*, 355 U.S. 300, 2 L.ed 2d. 292 and by *Public Service Commission of Utah v. United States, supra.* In the Utah case this court stated in regard to passenger deficits:

> "While a sweeping inquiry into these operations is not required, we believe that in light of our opinion in Chicago M. St. P. & P. R. Co. v. Illinois (U.S.) supra, the findings must reflect consideration of these factors in arriving at a general interstate freight level.

The court then went on to point out that the findings of the Commission did not reflect that they had given any consideration to the passenger deficit as it might affect the railroads overall need for additional revenue.

The same situation prevails in regard to the Commission order of December 7, 1959, issued after the further hearing. The findings in this latter order, which is the order being attacked in this proceeding, are almost identical with the findings in the order set aside in the earlier Utah case. There is nothing on the face of this order or in the findings to indicate that the Commission gave any consideration whatever to the passenger deficit either interstate or intrastate in arriving at its conclusion that intrastate rates were a burden on interstate commerce. So far as can be determined this matter was ignored entirely, even though the evidence brought out by the shippers on cross examination of the railroad witnesses establishes that the roads in question have very large passenger deficits without which they would show an average rate of return of more than 6%.

The railroads took the position, evidently concurred in by the Commission, that the amendments effected by the Transportation Act of 1958 made such a consideration unnecessary.

In its order, the Interstate Commerce Commission on page 3 thereof stated:

> "In addition the court noted an absence in our findings of any indication that we had concerned ourselves with the revenues derived from, or the conditions incl

> dent to, intratstate passenger operations. Subsequent to that decision Section 15(4) of the Act was amended by the Transportation Act of 1958 to provide that we may find unjust discrimination against, or an undue burden on, interstate commerce without a separation of interstate and intratstate property, revenues, and expense, and without considering in totality the operations or results thereof of any carrier or group or groups of carriers wholly within any State * * *

As stated above, the Commission gave no further consideration to the question of passenger deficit. The court below acknowledges that the Commission apparently gave no consideration to passenger operations, but held that the amendment to the act relieved the Commission from such a consideration unless an affirmative showing was made by protestants to the effect that intrastate passenger operations were more favorable than interstate passenger operations. In this regard the court stated:

> "In our opinion the amendment in this area does no more than to obviate the previously determined necessity of affirmative findings or evidence showing that the intrastate passenger deficit is not lower than the interstate or concerning the profitableness of, or circumstances surrounding, segments of intrastate operations with which the Commission was not immediately concerned. The legislative history of the amendment bolsters this view. There is nothing therein inconsistent with the further recognition that to rebut the prima facie presumption resulting from the amendment those who claim intrastate traffic as a whole is not discriminating against interstate commerce may show as an affirmative matter favorable aspects of intrastate operations."

The court reaches this conclusion from a consideration of the languge of the amendment itself, from the conference report on the bill and from the dissenting opinion of Mr.

Justice Frankfurter in the former Utah case to which the conference report makes reference. Counsel for the appellants cannot see anything in any of these three documents which would justify shifting to the protestants in a Section 13 case the burden of showing a difference in passenger operations intrastate and interstate, and relieve the railroads of the obligation of affirmatively proving that conditions are the same or similar.

The language of the amendment seems designed to meet the holding of the Milwaukee case so far as the consideration which must be given by the Commission to the passenger deficit and not to the situation that exists in the Utah case. In the Milwaukee case the railroads were seeking an increase in passenger fares intrastate on a showing that intrastate passenger fares were not yielding their fair share of the revenue requirements, without at the same time showing that overall intrastate traffic was not yielding its fair share of the revenue requriements. The amendment states that a finding as to an individual rate may be made without any finding as to the operations of the railroads within the state in total. The exact opposite of this situation exists in this case. Here the railroads purport to make a showing that the overall Utah intrastate operations are not yielding a fair return and from this the conclusion is reached that this failure results from the insufficiency of the particular segment of the rates on which an increase is sought, i.e. freight rates. This matter is not touched by the amendment either from the wording on its face nor from the discussion in the conference report. It is true that this court held in the King case that the Commission may order the passenger deficit intrastate made up from higher freight rates. However, in the Utah case they held that this is not a matter that should be done automatically but should

be done only after consideration of the passenger deficits and the freight revenues and a finding as to the equities of requiring the freight rates to complement the passenger deficit. The amendment does not change the holding of this court in the Utah case at all in this regard, and the Commission in ignoring the former holding of this court in reliance upon the amendment has committed error which should warrant the vacating of its order.

TERMINAL COSTS

In making proof under the formula set forth in the *King* case, it is the railroads' obligation to show that all material factors bearing upon the reasonableness of rates are substantially the same as affecting both intrastate and interstate rates, or at last not more favorable as to the intrastate rates. There is a complete absence of any such proof in regard to terminal costs intrastate v. interstate, except such breakdown as was incident to the abortive railroad separation, which was rejected by the Commission as being unreliable. All of the operating indications on which the railroads introduced evidence relate only to the over-the-road costs, and none of them to terminal costs.

The Interstate Commerce Commission has often recognized the fact that terminal costs represent a large portion of the railroads' costs. In the case of *Des Moines & Central Iowa v. Chicago, Burlington and Quincy Railroad Company, et al.*, 232 I.C.C. Reports 489, the Commission stated at page 494:

> "Terminal operations are a costly phase of railroad performance. Practical operating men have estimated that 40% of the transportation expense of the carriers is involved in their terminals. Counsel for defendants

observes that this figure is derived from a study by trunk lines railroads and is not based on complainants costs. The records of the carriers show that actually as high as 53.67% of the costs of transportation is represented in terminal costs. This terminal expense includes the cost of intermediate yard services and interchanges as well as the cost at origin and destination terminals."

Furthermore there can be no presumption that intrastate terminal costs in Utah will have the same impact per unit of traffic handled as the systemwide terminal costs of the roads. In fact the presumpton is quite the contrary. In the case of *Kansas City Transportation Bureau v. Atchinson, Topeka & Santa Fe Railway Co.*, 15 I.C.C. Reports 491, at page 493, the Commission stated:

"It cannot be doubted that the terminal expense in a greater center like Kansas City are greater than in a smaller place where terminal work can be done more expeditiously and economically."

In meeting this objection of the plaintiffs below, the appellants here, the District Court stated:

"The point most persistently urged by plaintiffs is that nowhere in the evidence introduced by the railroads is there any evidence to show that terminal costs bear as heavily on intrastate traffic as they do on interstate traffic. It is argued that the cost of maintaining and operating trminal facilities constitutes an important part of railroad expenses, citing Des Moines & Central Iowa v. Chicago, Burlington and Quincy Railroad Company, et al., 232 I.C.C. 489, and that all of the evidence going to similarity of conditions is concerned with the question of over-the-road costs.

"The railroads' response is that interstate terminal costs could not possibly be higher than intrastate terminal costs within Utah; that the latter traffic must of necessity have two terminal costs (origin and desti-

> nation) assigned to it; that interstate traffic would have only one if it originated or terminated in Utah; and bridge traffic moved across Utah would have none at all or, at most, one (where switched between railroads within the state)."

The answer set forth in the opinion to the contention of the plaintiffs below is not germane to the contention at all. Every shipment whether interstate or intrastate has two and perhaps more (in the case of intransit switching) terminal costs. The evidence of the railroads to which the court makes reference above was introduced in regard to the abortive effort to make a separation under the sa-called "North Carolina formula" and has no materiality at all in regard to proof under the *King* case formula, which is the basis upon which the Commission found that Utah intrastate rates were so low as to cast a burden on interstate commerce and the basis upon which the district court upheld that finding.

Again we represent there is no evidence as to similarity of terminal costs which make up from 40% to 55% of the total railroads' costs. In the absence of such evidence the railroads have not shown the similarity of conditions required. As this court stated in *Public Service Commission of Utah v. United States,* supra:

> "This evidence failed to establish that all material factors bearing on the reasonableness of the rates were substantially the same."

DENSITY

When this case was before this court previously, the court considered at some length the evidence in regard to density of traffic. The evidence of the protestants before the Interstate Commerce Commission, the appellants here, is the

same as in the preceding case. It shows that the density of all traffic within the state of Utah is materially higher in regard to each of the roads in question than the density systemwide on the same roads. The railroads have introduced additional evidence here which shows that within the state of Utah the traffic is made up of a greater proportion of interstate traffic than it is of intrastate. The railroads in making this showing have evidently attempted to follow the dissenting opinion of Mr. Justice Frankfurter as to what are the material factors to be shown in a density study. However, even in doing this, they have ignored and failed to show one essential factor that Justice Frankfurter says must be shown in order to give validity to the type of density study which they introduced. The dissenting opinion stated:

> "There is some, although less, probative value in a comparison between the density of interstate traffic confined to interstate traffic within the state and the density of intrastate traffic. For this comparison to be reliable, density of interstate traffic for the entire region for which the interstate rates have been set must be assumed to be substantially the same as the density of interstate traffic within the state."

There is shown by the railroads' study a comparison between the density of interstate traffic confined to interstate traffic within the state and the density of intrastate traffic. There is, however, no showing anywhere that density of interstate traffic for the entire region is substantially the same as the density of the interstate traffic within the state. Nor can such a presumption be indulged in, for the evidence definitely shows that the interstate traffic within Utah is materially heavier than the interstate traffic systemwide, and also that the intrastate traffic within Utah is materially heavier than intrastate traffic in other states in the region in which

the respondent carriers operate. It is submitted, therefore, that the railroads have introduced no evidence at all which would warrant a departing from the former finding of this court to the effect that the evidence fails to establish a similarity of conditions intrastate and interstate which warrant the application of the *King* case formula.

COMPARATIVE RATES

In order to show a discrimination against interstate commerce under the formula in the *King* case, it is necessary that the railroads show that the intrastate rates are not already as high or higher without the increases than are the interstate rates with the increases. This the railroads did not do, a fact which caused Interstate Commerce Commissioner Freas to dissent from the decision in the following language:

> "I am unable to agree with the conclusions of the majority to the extent that increases are prescribed.
>
> "If it is conceded that intrastate costs here are at least as high as interstate costs for similar traffic units, it is not established that unit revenue derived from the intrastate traffic is not also higher than that derived from interstate traffic."

The railroads introduced a number of exhibits, Exhibit 7CR through 20CR, showing the yield of various representative shipments both intrastate and interstate. Reducing these examples to a revenue per mile basis, this study shows that in the great majority of cases the car mile earnings on the intrastate rates are substantially higher without any increases than are the car mile earnings on the interstate rates including all of the ex parte increases.

On page 17 of the Interstate Commerce Commission order is a schedule showing in regard to systemwide operations

of the railroads and Utah operations the ton mile revenue and the ton mile expenses. This scale shows that in the year 1957 Utah operations without the increase on intrastate rates show a greater excess of revenue over costs than do systemwide operations with most of the increases in effect.

The figures break down as follows:

	Excess of Revenue over costs per ton mile (c)	
	Total Utah	Total System
Denver & Rio Grande	.59	.60
Southern Pacific	.69	.44
Union Pacific	.55	.51
Western Pacific	.48	.46

In light of these figures, it is difficult to see how Finding No. 3 of the Commission to the effect that intrastate rates and charges are lower than interstate can be sustained.

CONCLUSION

We do not ask the court to weigh the evidence in this case. We will concede that where there is substantial evidence to support the findings even though the evidence to the contrary may appear to be the more compelling, the court should support the Commission's order.

It will not require this court to examine the large volume of evidence before the Interstate Commerce Commission. It will merely require that the appellees refer in the record to any evidence on the reopened hearing which corrects the deficiencies previously found by this court to exist.

It is the contention of the appellants that the amendment to Section 13 effected by the Transportation Act of 1958 made

no substantial change in the law, but merely codified previously existing decisions of this court. On the other hand, it appears to be the intention of the railroads, sustained by the Interstate Commerce Commission and the court below that these amendments have obviated the necessity of proof. If the law is now, in light of these amendments, as the railroads contend, there is little need for the continued existence of state regulatory bodies so far as the regulation of rail rates is concerned. Under the theory of the railroads, in the ex parte interstate increase cases, the Commission may, on the basis of general nationwide evidence prescribe a uniform amount of increase not only for the different regions and different railroads having different revenue requirements on an interstate basis, but within each state on the intrastate rates where logic and reasoning must tell everyone that the situation so far as the revenues and costs of the carriers must differ greatly.

Uniformity of increase in rates might be desirable if all rates were on an equitable relationship prior to the increase and if the operating conditions of all railroads as affecting all types of rates were the same. Uniformity of increase, however, which ignores these factors not only does an injustice to the shippers, but does violence to the fundamental division of power between the state and federal governments.

Respectfully submitted,

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PROOF OF SERVICE

I, CALVIN L. RAMPTON, attorney for the appellants herein and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the ..... day of February, 1961, I served copies of the foregoing Jurisdictional Statement of Appellants on the several parties thereto as follows:

1. On the United States, by leaving a copy thereof at the office of A. Pratt Kesler, United States Attorney for the District of Utah, at Room 200 Federal Building, Salt Lake City, Utah, and by mailing a copy in a duly addressed envelope, with air mail postage prepaid to the Solicitor General, Department of Justice, Washington, D.C., and to Robert A. Bicks, Acting Assistant Attorney General, Department of Justice, Washington, D. C.

2. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope with air mail postage prepaid, to Robert W. Ginnane, Esq., Gen. Counsel, and to Charles H. Johns, Assistant Counsel, at the offices of the Commission, Washington 25, D.C.

3. On the intervening defendants by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective counsel of record as follows:

To:

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

CIVIL NO. C-58-60
MEMORANDUM DECISION

UTAH CITIZENS RATE ASSOCIATION, and STRUCTURAL STEEL & FORGE CO.,
Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants,

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, THE WESTERN PACIFIC RAILROAD COMPANY, UTAH RAILWAY COMPANY, TOOELE VALLEY RAILWAY COMPANY, SALT LAKE GARFIELD AND WESTERN RAILWAY COMPANY, THE OGDEN UNION RAILWAY AND DEPOT COMPANY,
Intervening Defendants.

Calvin L. Rampton, Esquire, (Pugsley, Hayes, Rampton & Watkiss) Salt Lake City, Utah, for plaintiffs.

John H. D. Wigger, Esquire, (Robert A. Bicks, Esquire, and A. Pratt Kesler, Esquire, with him on the briefs) for the defendant, United States of America.

C. H. Johns, Esquire, Associate General Counsel, Interstate Commerce Commission, (Robert W. Ginnane, Esquire, General Counsel, with him on the briefs) for the defendant Interstate Commerce Commission.

A. U. Miner, Esquire, and L. W. Hobbs, Esquire, (Bryan P. Leverich, Esquire, Elmer B. Collins, Esquire, Ernest P. Porter,

Esquire, Albert R. Bowen, Esquire, Arthur A. Allen, Esquire and S. N. Cornwall, Esquire, with them on the briefs) for the intervening defendant carriers.

Before LEWIS, Circuit Judge, and CHRISTENSON and CHILSON, District Judges.

CHRISTENSON, District Judge.

Plaintiffs, pursuant to procedure prescribed in 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325, seek by this action to have set aside an order of the Interstate Commerce Commission which requires the railroads operating in Utah to increase, with certain exceptions, Utah intrastate freight rates in correspondence with increased interstate rates approved by the Commission in three nationwide revenue proceedings designated as Ex Parte Nos. 175, 196 and 206.

Two principle questions are presented for determination by this Court: (1) whether plaintiffs in the present proceedings have standing to question the validity of the findings and order of the Commission; and if so, whether such findings and order are supported by substantial evidence.

Interstate freight rates were increased nationwide by the Interstate Commerce Commission in its Ex Parte No. 175, 284 I.C.C. 589, 280 I.C.C. 179, 281 I.C.C. 557. The Public Service Commission of Utah refused to allow similar increases on intrastate traffic. A Thirteenth Section investigation and hearing were conducted by the Interstate Commerce Commission upon which it issued a report, 297 I.C.C. 87, and later an order, directing that intrastate freight rates in Utah be increased to comport with increases granted interstate in Ex Parte No. 175. This order was sustained by a three-judge court in this district, *Public Service Commission of Utah v. United States*, D.C. Utah 1956, 146 F.Supp. 803. On May 19,

1958, the Supreme Court of the United States on appeal reversed. *Public Service Commission of Utah v. United States*, 1958, 356 U.S. 421, 78 S.Ct. 796, 2 L.Ed. 886. Pursuant to the mandate, it was thereupon directed by this Court that the Commission's order be set aside and that the cause be remanded to the Interstate Commerce Commission for further proceedings in conformity with the Supreme Court's opinion.

In the meantime, in Ex Parte No. 196, 298 I.C.C. 279, and again in Ex Parte No. 206, 299 I.C.C. 429 and 300 I.C.C. 633, the Interstate Commerce Commission authorized additional rate increases on interstate traffic. A further Thirteenth Section investigation was instituted and administrative hearings were held. The Commission, on December 7, 1959, issued its report in the combined proceedings (Docket Nos. 31484 and 32253) in which it allowed the Public Service Commission of Utah thirty days in which to approve the increases held required to remove the burden upon interstate commerce. Within this time the Public Service Commission of Utah notified the Interstate Commerce Commisison that it would not enter such an order. The Utah Citizens Rate Association filed a petition for rehearing and reconsideration with the Interstate Commerce Commission. On March 17, 1960, the Commission issued it. order, assailed in this proceeding, denying the petition for rehearing and reconsideration, and requiring the railroads to establish, effective May 13, 1960, the increased rates and charges for intrastate transportation within the State of Utah in accordance with the findings contained in its report.

Utah Citizens Rate Association initially brought this action as sole party plaintiff. Its capacity and standing to raise the issue here involved were questioned by the defendants. We granted leave to the Association to join as a party plaintiff. Structural Steel and Forge Company, a substantial shipper in

Utah intrastate commerce. Defendants assert that even with this addition, the plaintiffs have no legal standing to maintain this action to set aside a general revenue order of the Commission.

Lack of statutory capacity to sue may disempower an association from maintaining such an action as this. *Moffat Tunnel League v. United States*, 1933, 289 U.S. 113, 53 S.Ct. 543, 77 L.Ed. 1069. Neither the general capacity to sue and be sued vested in the Utah Citizens Rate Association as a non-profit corporation by Utah Code Annotated 1953, §§16-6-1, 16-6-8, nor its statutory authorization to appear as a party or to intervene herein by virtue of 28 U.S.C. § 2323, affords standing for it to maintain an action to enjoin the Commission's order. *Pittsburgh & W. Va. Ry. v. United States*, 1930, 281 U.S. 479, 50 S.Ct. 378, 74 L.Ed. 980, and *Alexander Sprunt & Son, Inc. v. United States*, 1930, 281 U.S. 249, 50 S.Ct. 315, 74 L.Ed. 832; *cf. Chicago Junction Case*, 1924, 264 U.S. 258, 267-268, 44 S.Ct. 317, 320, 68 L.Ed. 667, and *Merchants' & Manuf. Traffic Ass'n v. United States*, 231 F. 292, reversed other grounds, 1916, 242 U.S. 178, 37 S.Ct. 24, 61 L.Ed. 233. This is for the reason that it possesses no legal right or interest that would be injuriously affected by the order.

The reason and result, however, do not pertain to plaintiff Structural Steel and Forge Company. The distinction is clearly established in *Alexander Sprunt & Son v. United States*, supra, in which the following cases allowing the maintenance of similar actions by those directly affected are distinguished by the court in connection with its denial of relief to parties with only an indirect or sentimental interest. *United States v. Village of Hubbard, Ohio*, 1925, 266 U.S. 474, 45 S.Ct. 160, 69 L.Ed. 389; *The Chicago Junction Case*, supra; *Skinner & Eddy Corporation v. United States*, 1919, 249 U.S. 557, 39 S.Ct. 375, 63

L.Ed. 772; *Interstate Commerce Commission v. Diffenbaugh*, 1911, 222 U.S. 42, 32 S.Ct. 22, 56 L.Ed. 83. In the last cited cases standing was recognized on the part of shippers or others directly affected by the orders of the Commission. Compare *Jersey City v. United States*, D.C.N.J. 1950, 101 F. Supp. 702, pressed upon us by the defendants, where Judge Marris, for the Court, pointed out that the plaintiff had not shown that any of its rights as a municipal corporation would be adversely affected by the Commission's order. Moreover, the foundational power to adopt and enforce statewide revenue orders affecting intrastate rates is involved. See *Skinner & Eddy Corporation v. United States*, supra; and the *Utah* rate case. To deny the standing of a shipper to be heard as to the validity of the Commission's order would do violence to the very base of constitutional government, the power of those directly aggrieved by claimed illegal action to be able to invoke judicial power against it.

We conclude that the plaintiff shipper has standing to maintain this action under the party in interest criterion of 28 U.S.C. § 2323 and under the person adversely affected or aggrieved standard of § 10(2) of the Administrative Procedures Act, 5 U.S.C. § 1009(a). See *American Trucking Assns. v. U.S.*, 1960, 364 U.S. (1); *Garden City Floral v. United States, D.C.* Mont. 1956, 143 F.Supp. 609

What already has been said largely disposes also of the question of the exhaustion of administrative remedies raised by the defendants The so-called saving clause in the Commission's order,(1) asserted by the defendants as the appro-

(1) "The foregoing findings relate to Utah intrastate rates generally, and are without prejudice to reexamination, upon complaint or otherwise, as to the lawfulness of any individual Utah intrastate rate on any particular commodity."

priate and only remedy open to plaintiffs, is not applicable where the validity of the entire state-wide revenue order is called into question on jurisdictional grounds. In this position, as in our sustaining of the shippers standing to raise the question, the procedurally parallel case of *Garden City Flora. v. United States*, supra, supports us, although we doubt that the Association itself would have standing to raise the question. The following cases primarily relied upon by defendant to demonstrate that "the plaintiffs have mistaken their remedy in the statutory scheme of railroad rate-making," and that they should await a more appropriate occasion to complain pursuant to the saving clause of the order, are not in point: *Georgia Public Service Commission v. United States*, 1951, 283 U.S. 765, 51 S.Ct. 619, 75 L.Ed. 1397; *Algoma Coal & Coke Co. v. United States*, D.C. Va. 1935, 11 F.Supp 487; and *Koppers Company v United States*, D.C. Pa. 1955, 132 F. Supp. 159. *Algoma* and *Koppers* involved merely permissive rates on selected commodities in interstate commerce. In *Georgia*, language quoted by the defendants does indeed indicate that the plaintiffs there would not be heard to attack a statewide order governing "a vast multitude of rates" (even though among the plaintiffs there was the Georgia Public Service Commission as well as intervening shippers). But the attack, so procedurally rejected, was upon the basis of "possible uncertainty of application in isolated instances." (P. 622 of 51 S.Ct.) On the other grounds on which the order was assailed, including claimed insufficiency of the findings and evidence to show undue prejudice to interstate shippers by intrastate rates, no question was raised by the Court as to the standing of the plaintiffs. We thus reach the merits of the controversy.

The law of the case was established by the decision of

the Supreme Court in *Public Service Commission of Utah v. United States*, supra. This decision remains controlling unless the state of the evidence before the Commission is now significantly different or the application of the Supreme Court's decision has been changed by the 1958 amendments to Section 13(4) of the Interstate Commerce Act, introduced by the Transportation Act of 1958, P.L. 85-625, 85th Cong., 49 U.S.C. 13(4).

In reversing our prior decision, the Supreme Court said that the order of the Commission was vulnerable in the following respects:

1. As to the finding that the prevailing intrastate rates were abnormally low and failed to contribute a fair share of over-all revenue, there was no positive evidence before the Commission to indicate the relative costs and expenses of the intrastate as against interstate shipments.

2. There was no substantial evidence to support the finding that intrastate conditions were not more favorable than those incident to interstate transportation.

3. There was an absence in the findings of any indication that the Commission concerned itself with the revenues and conditions relative to intrastate passenger operations.

Shortly after the Supreme Court's decision, § 13(4) of the Act was amended by the addition of the portions underlined (49 U.S.C. § 13(4)):

> "§13, par. (4) Duty of Commission where State regulations result in discrimination. Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the

> one hand, and interstate or foreign commerce on the other, or any undue, unreasonable, or unjust discrimination against, *or undue burden on*, interstate or foreign commerce (*which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier, or group or groups of carriers wholly within any State*), which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, discrimination, *or burden*. . . ."

The addition of the phrase, "or undue burden on" adds nothing to the existing law but amounts merely to a codification of language used in prior court decisions. As early as 1931 the Supreme Court in *Georgia Public Service Comm. v. United States*, supra, used the phrase, "undue burden" interchangably with, or in apposition to "unjust discrimination." 283 U.S. 765, 773, 51 S.Ct. 619, 622, 75 L.Ed. 1397.[2] And the Court in its 1958 decision in the *Utah* rate case stated, "Federal power exists in this area . . . when . . . those rates

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(2) We can find little basis in the decisions for doubt alluded to in the Conference Report referring to this part of the amendment. Itwas said: "The first amendment is the insertion of the words 'or undue burden on' in the present language describing the protection extended to interstate commerce. The addition of these words would serve to remove any doubt as to the Commission's power in instances where, upon appropriate records, it finds, as it has done in some section 13 proceedings, that the burden case upon interstate commerce by intrastate rates or charges is undue and therefore unjustly discriminatory. Such findings have been questioned in the courts. This proposed change would thus afford the Commission additional statutory support needed in the administration of section 13." Conference Report No. 2274, July 24, 1958 (to accompany S. 3778), 1958 U.S. Code Cong. & Admin. News, 85th Cong., 2nd Sess., Vol. 2, p. 3484.

cast an undue burden on interstate commerce." (Citing § 13(4) as it stood prior to the 1958 amendment.) 356 U.S. 421, 425.

The parenthetical addition, relating to the method of determination by the Commission of undue burden or discrimination, is also partly a codification of prior decisional law. The phrase "which the Commission may find without a separation of interstate and intrastate property, revenue and expenses," is merely permissive and reflects the procedure approved by the Supreme Court in such cases as *King v. United States*, 1952, 344 U.S. 254, 73 S.Ct. 259, 97 L.Ed. 301; *Illinois Commerce Comm. v. United States*, 1934, 292 U.S. 474, 54 S.Ct. 783, 78 L.Ed. 1371; and *Georgia Public Serv. Comm. v. United States*, supra.

The next phrase, "without considering in totality the operations or results thereof of any carrier, or group or groups of carriers wholly within any State," could mean simply that in a revenue case such as this the Commission need not investigate specific rates as it would in a rate case. If understood in this way only a further codification of existing law would be involved. However, defendants contend that the amendment means in its wide ambit that the Commission may find despite any affirmative indication to the contrary that a segment of intrastate rates represents an ultimate "burden" upon interstate commerce without reference to the question of whether intrastate rates generally make it such a burden. Thus broadly interpreted, the amendment not only would overrule the Supreme Court's decision in *Chicago, St. P. & P. R. Co. v. Illinois*, 1958, 355 U.S. 300, 78 S.Ct. 304, 2 L.Ed. 2d 292, as reaffirmed in the *Utah* rate case, supra, but might permit the entire field of rate regulation to be federally arrogated by a separate treatment of segments unrelated to the net or

total effects. The result could follow, as apprehended by plaintiffs here, that intrastate transportation generally would be required to subsidize interstate transportation as far as overall operations are concerned. Indeed, Mr. Justice Frankfurter, in his dissenting opinion in the *Utah* case recognized the problem and acknowledged the possible result (P. 459 of 356 U.S.):

> "There is no apparent reason why a lower passenger deficit, like any other favorable circumstance surrounding intrastate transportation, would not justify a lower rate on intrastate freight traffic. If intrastate traffic taken as a whole contributes its fair share to needed revenues and does not, from a revenue standpoint, discriminate against interstate commerce, what justification can there be for a finding of discrimination that is possible only because a segment of intrastate traffic is considered in isolation? Raising rates in this situation may have the effect of compelling intrastate commerce to contribute more than its fair share."

But he added:

> "It does not necessarily follow that the Commission should be required to make findings, supported by evidence in the record, that the intrastate passenger deficit is not lower than the interstate, or about the profitableness of, or circumstances surrounding, any segment of intrastate operations with which it is not immediately concerned. Indeed, the consequences that follow in the train of such a requirement demonstrate that it exalts formal consistency over sound policy. In the first place, if the Commission must determine the profitableness of intrastate passenger operations, it will of course be compelled to segregate revenues and costs attributable to intrastate and interstate traffic. Yet it is precisely this that in Illinois Commerce Comm'n v. United States, 292 U.S. 474, and the King case we said, urged on by the difficulty of accurate allocation, was not required when interstate and intrastate traffic were mingled together."

We believe that a matter of procedure rather than any substantive change in the basic transportation policy of the Congress is involved. If this were not so, serious conceptual and constitutional, and further practical difficulties, would be invited. But there seems no reason why Congress cannot provide or clarify a procedural factor to render more practical the formula it has theretofore established, and which was, under existing law appropriately considered by the majority in the *Utah* rate case. In our opinion the amendment in this area does no more than to obviate the previously determined necessity of affirmative findings or evidence showing that the intrastate passenger deficit is not lower than the interstate or concerning the profitableness of, or circumstances surrounding, segments of intrastate operations with which the Commission was not immediately concerned. The legislative history of the amendment bolsters this view.(3) There is nothing therein

(3) Statement of the managers on the part of the House in the Conference Report, 1958 U.S. Code Cong. & Admin. News, 85th Cong., 2nd Sess., Vol. 2, p. 3484-85:

"The second amendment is the insertion of the following words: (which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses and without considering in totality the operations or results thereof of any carrier, or group or groups of carriers wholly within any State).

With this amendment, in order to exercise its jurisdiction over intrastate rates, the Commission still must find that such rates cause undue, unreasonable, or unjust discrimination against, or undue burden on interstate commerce. The amendment deals only with the nature of the evidence to support such a finding. By two recent decisions of the Supreme Court (Chicago, Milwaukee, St. Paul and Pacific Railroad Co. v. State of Illinois (January 13, 1958), 355 U.S. 300, 356 U.S. 906, 78 S.Ct. 304, 665, and Public Service Commission of Utah v. United States (May 19, 1958), 356 U.S. 421, 78 S.Ct. 796, 2 L.Ed.2d 886), the Commission is required to consider the entire State operation, freight and passenger, in determining whether or not the intrastate freight rates were causing an undue revenue discrimination against inter-

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inconsistent with the further recognition that to rebut the prima facie presumption resulting from the amendment those who claim intrastate traffic as a whole is not discriminating against interstate commerce may show as an affirmative matter favorable aspects of intrastate operations. The dissenting opinion to this effect[4] referred to the then pending bill

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state commerce. If the holdings in these cases mean that the required findin[illegible] of—

> undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce—

can be made only in the light of the overall statewide totality of a carrier's operating results derived from its entire body of rates applicable within the State, it would preclude the Commission from making such a finding on a showing of only the effect of the particular rate or rates in question. The Commission could not, under such an interpretation, continue to function effectively in removing unjust discrimination against interstate commerce caused by intrastate rates and charges.

Rather than the amendment causing a change, it is the possible interpretation of these recent court decisions that would create a change in the present regulatory scheme. As stated in the dissenting opinion (of four justices) in the Utah case, a consequence of the decisions—

> "would be a radical, and in all likelihood unworkable change in the way the Commission has administered the provisions of section 13(4) for over 35 years."

(4) Dissenting Opinion, pp. 462 of 356 U.S.:

> "Of course, those who contend that intrastate traffic as a whole is not discriminating against interstate traffic may come forward and show, as they may in respect to any claimed dissimilarity of conditions surrounding interstate and intrastate traffic, some favorable aspect of intrastate operations that the Commission should take into account. In the absence of such a showing, however, the Commission should be able to assume that discrimination shown to exist as to the particular segments of intrastate and interstate traffic with which the § 13(4) proceeding is concerned is not offset by other conditions that this Court speculates may affect wholly different segments of intrastate commerce. The record in the present case is devoid of the remotest suggestion that the

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couched in the same language as that later adopted in the Transportation Act of 1958,[5] and the Committee, considering the pending legislation, cited the dissenting opinion with apparent approval. Mr. Justice Frankfurter's position on the point therefore should be accepted as persuasive.

As thus interpreted, we perceive no constitutional problem. And we must conclude that the absence in the findings of an indication that the Commission concerned itself with the revenues and conditions relative to intrastate passenger operations does not render the present order vulnerable. There was no affirmative showing by the plaintiffs, or at all, that such revenues and conditions would have altered the burden upon interstate commerce found to have existed from a consideration by the Commission of revenues and conditions pertaining to the freight component.

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> Utah intrastate passenger deficit is any less than the interstate passenger deficit, and the Commission should not be required to seek out such evidence itself and make findings beyond those it has already made.
>
> "This is a solution that accommodates imponderables and does not demand precision where the nature of the subject can yield only approximations. It is a solution responsive to the difficult regulatory problems posed by § 13(4). Embedded in it are some of the advantages in simplicity of administration that would follow if this Court had expanded, as it might well have done, the doctrine of discrimination against persons or localities to permit statewide orders protecting all interstate shippers against discrimination without reference to revenues. At the same time, there remains an opportunity for intrastate shippers or a state commission to show to the Interstate Commerce Commission's satisfaction the existence of specific factors favoring intrastate traffic in general that should not wisely be ignored. It is the solution that seems best designed to achieve the purposes of the Act without interposing insurmountable obstacles to the effective regulation of the national transportation system, the responsibility for which rests after all, predominantly with the Interstate Commerce Commission.

(5) See footnote 3, and pages 460-461 of 356 U.S.

With reference to the other two points on which the Supreme Court in the *Utah* rate case held the evidence to be insufficient, we have carefully examined the record before the Commission and believe that the prior deficiencies have been corrected within the law of the case. The point most persistently urged by plaintiffs is that nowhere in the evidence introduced by the railroads is there any evidence to show that terminal costs bear as heavily on intrastate traffic as they do on interstate traffic. It is argued that the cost of maintaining and operating terminal facilities constitutes an important part of railroad expenses, citing *Des Moines & Central Iowa v. Chicago, Burlington and Quincy Railroad Company, et al.*, 232 I.C.C. 489, and that all of the evidence going to similiarity of conditions is concerned with the question of over-the-road costs.

The railroads' response is that interstate terminal costs could not possibly be higher than intrastate terminal costs within Utah; that the latter traffic must of necessity have two terminal costs (origin and destination) assigned to it; that interstate traffic would have only one if it originated or terminated in Utah; and bridge traffic moving across Utah would have none at all or, at most, one (where switched between railroads within the state).

Beyond these latter circumstances, and the general evidence tending to show that conditions affecting intrastate traffic were not more favorable than those pertaining to interstate traffic, density of traffic studies are now more convincing in favor of the carrier's position. Additional specific data and new comparative ratios have been presented by them which include terminal costs in the evaluated factors. And the record heretofore held to be deficient has been otherwise strengthened. In combination, these considerations have led us to conclude

that the Commission's present order is not vulnerable to this focused attack, nor to the other objections now urged by plaintiffs.

Other matters urged in the briefs are deemed not sufficient to require special discussion here or to impair the action of the Commission.

We conclude that the plaintiffs' complaint should be, and it is hereby, dismissed. The defendant carriers are released from the protective order with respect to the impounding of revenue from the disputed increases. Defendants are awarded their taxable costs herein.

/s/ A. SHERMAN CHRISTENSON
United States District Judge

/s/ HATFIELD CHILSON
United States District Judge

LEWIS, Circuit Judge, concurring:

I am in complete agreement with the views expressed in my brother Christenson's opinion relating to the merits of this case and with the result. However, I do not share the confidence expressed that the action may be maintained at the instance of a single shipper and deem it desirable to reserve an expression of my views upon that important question until such time as the point may be determinative.

/s/ DAVID T. LEWIS
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

CIVIL NO. C-58-60

ORDER ON PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT

UTAH CITIZENS RATE ASSOCIATION, and STRUCTURAL STEEL & FORGE CO.,
Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants,

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY, SOUTHERN PACIFIC COMPANY, THE WESTERN PACIFIC RAILROAD COMPANY, UTAH RAILWAY COMPANY, TOOELE VALLEY RAILWAY COMPANY, SALT LAKE GARFIELD AND WESTERN RAILWAY COMPANY, THE OGDEN UNION RAILWAY AND DEPOT COMPANY,
Intervening Defendants.

Before LEWIS, Circuit Judge, and CHRISTENSON and CHILSON, District Judges.

The plaintiffs have filed a timely motion to alter or amend the judgment contained in our memorandum decision herein (a) to grant judgment to the plaintiffs as prayed for in the complaint, setting aside and declaring null and void the order of the Interstate Commerce Commission dated March 17, 1960, in I.C.C. Docket Nos. 32484 and 32253, and (b) to require the defendants to hold intact moneys heretofore im-

pounded under the order of this court in this action, dated May 11, 1960, until such time as the parties may have exhausted their remedies by appeal or until the time for taking an appeal shall have expired.

Memoranda in support of, and in resistance to, this motion have been filed by counsel for the respective parties; and on December 20, 1960, they stipulated in writing the motion could be deemed submitted upon these memoranda and without oral argument.

On May 11, 1960, upon plaintiffs' application for a temporary injunction and its denial, but as a part of the order of denial, this Court said:

> "It is further ordered, however, that the intervening railroads . . . shall keep separate the increased amounts of moneys received by them through the application of the increased freight rates involved herein pending the determination of the merits by the Court of the question of a permanent injunction against the enforcement of the Interstate Commerce Commission order allowing such increases, and shall impound said moneys in separate bank accounts of the respective railroads to be accounted for and held subject to the order of this Court pending final determination of all matters involved herein, including final decision of the United States Supreme Court in the event of an appeal, such funds thereafter to be distributed to such shippers as may be determined by this Court to be entitled thereto in the event final judgment be such as to vacate and annul the said order or any subsequent order of the Interstate Commerce Commission insofar as they increase intrastate freight rates within the State of Utah here involved, otherwise to be returned to said railroads.
>
> "The Court hereby retains jurisdiction for the purpose of making any necessary orders with respect to

refund to shippers or to direct that impounded moneys be returned to the railroads."

The foregoing provision was based substantially upon the proposal of the railroads which they suggested as an alternative to the Court's granting the temporary restraining order prayed for by the plaintiffs.

In our decision and judgment we said:

"We conclude that the plaintiffs' complaint should be, and it is hereby, dismissed. The defendant carriers are released from the protective order with respect to the impounding of revenue from the disputed increases . . ."

This disposition was not intended to, and could not properly, alter the previous order which was based upon the railroad's proposal, with respect to the moneys impounded up to the date of the Court's judgment. To remove uncertainty in this respect, the last paragraph of the Court's decision and judgment is amended to read as follows:

"We conclude that the plaintiffs' complaint should be, and it is hereby, dismissed upon the following conditions. The defendant carriers are released from the protective order with respect to impounding future revenues from disputed increases. The funds from such increases impounded pursuant to the order of the Court dated May 11, 1960, and received prior to November 23, 1960, the date of the filing of the judgment herein, shall continue to be held and impounded by said railroads in separate bank accounts and shall be accounted for and held subject to the order of this Court pending final determination of all matters involved herein, including final decision of the United States Supreme Court in the event of an appeal, such funds thereafter to be distributed to such shippers as may be determined by this Court to be entitled

thereto in the event final judgment be such as to vacate and annul the said order or any subsequent order of the Interstate Commerce Commission insofar as it increases the intrastate freight rates here involved within the State of Utah, otherwise to be returned to said railroads. Defendants are awarded their taxable costs herein."

Except as above specifically provided, the Court's decision and judgment as heretofore filed shall be and remain in full force and affect, and as so modified shall constitute the judgment of this Court.

Some question has arisen as to the power of this court to make the foregoing correction by reason of the filing by the plaintiffs of notice of appeal from our original judgment after the filing of the motion to alter and amend the judgment. It is generally considered that an appeal when properly perfected divests the trial court of jurisdiction of the case. But this principle has not been extended to preclude the correction of the record so that the proceedings as they actually occurred are properly set forth. 3 Am. Jur. Appeal and Error, §5[illegible], p. 193; Rule 60(a) F. R. Civ. Proc.; see *Greenburg v. Arsenal Bldg. Corp.*, 2nd Cir. 1944, 144 F. 2d 292 (provision for interest thought to be implicit in judgment could be added after appeal), rev'd on other grounds 324 U.S. 697, 65 S.Ct. 895, 89 L.Ed. 1296. In *Hovey v. McDonald*, 1883, 109 U.S. 150, 3 S.Ct. 136, 27 L.Ed. 888, the Supreme Court said that a correction of the form of a decree after appeal by adding a direction to a receiver to pay over money in his hands which he had been restrained from paying over by an injunction during the pendency of the suit was not invalid, because that was a "thing of course," in view of the record in the case. And about the same may be said of the foregoing amendment. If the present motion to amend the court's order in respect to

impounded funds is regarded as a motion under Rule 60(a), supra, as well it may be, our action would come within its express provision that such amendment can be made, notwithstanding the pendency of an appeal, at any time prior to the docketing of the case on appeal. Since the record on appeal has not been certified, it is apparent that the case has not been docketed. See Supreme Court Rule 13. Moreover, the continued protection to the plaintiffs, pending appeal, in accordance with the pre-existing direction of the court may be considered in the nature of a stay within the spirit of the Revised Rules of the Supreme Court, Rules 18 and 51(2) which encourage stay applications to be made in the first instance to the courts below. See *Cumberland Tel. & Tel. Co. v. Louisiana Public Service Com'n.*, 1922, 260 U.S. 212, 43 S.Ct. 75, 67 L.Ed. 217, where only one Judge signed the order, but the power of the lower court otherwise was not denied. The fact that the railroads themselves initially proposed this very continuing provision may be deemed a waiver of a supersedeas bond.

Finally, it seems doubtful that our judgment was appealable because of lack of finality in view of the present intervening motion. See Fed. R. Civ. Proc. 59(e), 73; see also 28 U.S.C. §2284(5); cf. 28 U.S.C. §1253.

Dated this 6th day of January, 1961.

BY THE COURT

DAVID T. LEWIS
Circuit Judge

A. SHERMAN CHRISTENSON
District Judge

HATFIELD CHILSON
District Judge